NO. 34705-2

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

v.

RAYMOND RAAB

APPELLANT,

BRIEF OF RESPONDENT

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1. Did the trial court improperly comment on the evidence by including the victims' names in jury instructions, when the names were not elements of the crimes?

2. Did the trial court properly order the defendant to pay cost following his conviction?

3. Is the argument against imposition of appellate cost premature?

B. STATEMENT OF THE CASE

On October 22, 2015, Washington State Department of Natural Resources (hereinafter "DNR") firefighters investigated a column of smoke visible from over a mile away from the location they were working. RP 97, 158. The firefighters found an unattended fire upon arrival at the defendant's property. RP 98-99, 101, 131, 143, 159. The firefighters began preparing to extinguish the blaze, when they were confronted by the defendant who had exited a nearby residence. RP 102.

The defendant was aggravated and yelled for the firefighters to "get the fuck off" his property. RP 102-103, 144-145, 160. In an attempt to calm the defendant, Enrique Ortega advised the defendant that he was burning illegally, but that Mr. Ortega was not

going to issue a citation to him. RP 103. The defendant continued to approach and confront the firefighters and threatened to retrieve a rifle and shoot them. RP 103, 112-114, 132, 145, 150-151, 161.

After being advised the firefighters would have to come back to attend the fire with a deputy, the defendant also threatened to shoot the deputy. RP 115, 145, 161.

Okanogan Sheriff's Deputy Terry Shrable responded to the firefighters' 911 call. Deputy Shrable went to assist the two DNR firefighting crews who were being threatened and prevented from putting out a fire. RP 87-88, 117-118. Deputy Shrable contacted the firefighters, Enrique Ortega, Carlos Moreno, Mick Fulmer, and Cody Epps, who had retreated from the defendant's property. RP 90, 163

After contacting the firefighters, Deputy Shrable made contact with the defendant who was confrontational and exhibited the odor of intoxicants. RP 90-91. See also RP 146.

After the defendant was detained, the firefighters were able to return to the property and extinguish the fire. RP 118-119, 163.

Mr. Ortega worked for DNR, as a firefighter and engine leader. RP 93. Part of the duties in that position included acting as warden officer to enforce burning regulations. RP 93, 94. Cody

Epps also worked in the same capacity for DNR as a firefighter / engine leader and warden officer. RP 156-159, 162.

Mick Fulmer was a firefighter assigned to the fire engine supervised by Cody Epps. RP 130. Carlos Moreno was a firefighter assigned to the fire engine supervised by Enrique Ortega. RP 141-142.

The to-convict instructions for the four alleged counts of intimidating a public servant were set out in instructions 6, 7, 8, and 9. CP 25-28. The name of the victim, to whom each count applied, was indicated in the to-convict instruction by including the name in parentheses. CP 25-28.

"Public Servant" was defined in instruction 13 as:

> "...any person who presently occupies the position of or has been elected, appointed or designated to become any officer or employee of government; and any person participating as an advisor, consultant, or otherwise in performing a governmental function."

CP 32; See also WPIC 2.22.

The Court dismissed counts 6 and 7 charged in the original information, and renumbered the remaining counts. RP 270. This eliminated the State's proposed instructions 11 and 12. RP 260. The to-convict instructions for the remaining two counts of obstructing a law enforcement officer were set out in the court's

instructions 11 and 12. CP 30-31. The name of the victim, to whom each count applied, was indicated in the to-convict instruction by including the name in parentheses. CP 30-31.

"Law enforcement officer" was defined in instruction 19 as:

> "...includes public officers who are responsible for enforcement of fire, building, zoning and life and safety codes."

CP 38. "Public officers" was also defined in instruction 20. CP 39.

Defense counsel made no objection to the to-convict instructions. Defense counsel objected to Instructions 5 and 10, which where the definitional instructions of the crimes. RP 274. Though not well articulated, defense counsel objected to the definitional instructions because they did not contain the elements that were contained in the to-convict instructions 6, 7, 8, 9 for intimidating, and 11, 12, for obstructing. RP 274-275. The court gave instructions 5 and 10. RP 275.

Following deliberations, the jury found the defendant guilty of Count 1, intimidating a public servant, Count 4, intimidating a public servant; count 5 obstructing a law enforcement officer; and Count 6, obstructing a law enforcement officer.

The jury found the defendant not guilty of Counts 2 and 3, intimidating a public servant that pertained to Carlos Moreno, and Mick Fulmer. RP 317-321.

At sentencing, the court imposed legal financial obligations after making an individualized determination of the defendant's ability to pay, based on monthly income, and the fact that the defendant owned 110 acres of property. RP 349-350.

C. ARGUMENT

1. The trial court did not comment on the evidence when it included the victims' names in the jury instructions.

A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. *State v. Dent*, 123 Wash. 2d 467, 478, 869 P.2d 392 (1994). Some reasonable showing of a likelihood of actual prejudice is what makes a "manifest error" affecting a constitutional right. *State v. Lynn*, 67 Wash. App. 339, 346, 835 P.2d 251 (1992) (quoting RAP 2.5(a)(3)).

The appellant is incorrect in asserting that *State v. Jackman*, 156 Wash. 2d 736, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007) controls in this cases. In *Jackman*, 156 Wash. 2d 736, the

defendant's charges included sexual exploitation of a minor, communication with a minor for immoral purposes, patronizing a juvenile prostitute, and furnishing liquor to a minor – all of which required as an element of the offense a determination of the age of the victim. *See Jackman*, 156 Wash. 2d 736. On appeal, the *Jackman* Court found there was improper judicial comment where the dates of birth of the minors were included in the to-convict instructions.

In the present case, *Jackman* does not control, and is not even relevant to the analysis. Although failure to instruct on an essential element is an error of constitutional magnitude, there is no legal support for the Appellant's contention that the victim's name is an essential element of a crime. *State v. Johnston*, 100 Wash. App. 126, 134, 996 P.2d 629, 634–35 (2000). *See also, State v. Plano*, 67 Wash. App. 674, 679–80, 838 P.2d 1145, 1148 (1992) (the name of the alleged victim is not a statutory element of the crime of assault in the fourth degree, and no common law authority supports the proposition that the name of the victim is an essential element); *State v. Levy*, 156 Wash. 2d 709, 722, 132 P.3d 1076, 1082 (2006) (the victim's name is not an element of the offense and does not

constitute a comment on the evidence for the court to name the alleged victim in a jury instruction).

The victims' names are not an element, and their inclusion is not a comment on the evidence. In the present case, the names of the victims were contained in parentheses. By definition, parentheses are used to set off structurally independent information that is useful to the reader but not crucial to the meaning of the sentence. Because there were a number of identical counts pertaining to multiple victims, the court properly included the names of the victims in order to assist the jury in identifying which counts pertained to which victim.

There were no improper judicial comments that relieved the State of its burden to prove the elements of the crimes. Even if we assumed for argument sake, that inclusion of a victim's name was a judicial comment on the evidence, the record is clear that there was no prejudice to the defendant. The names were not an element of the offense, and they would not have changed the elements of the instruction, whether they were included or not. Additionally, the jury acquitted the defendant in Counts 2 and 3 where the victims' names were included. Based on the verdicts, the jury clearly did not make any assumptions or inferences from the inclusion of the

names, nor did they equate the names as establishing proof of an element.

2. The trial court did not abuse its discretion when it ordered the defendant to pay legal financial obligations.

The trial court made specific findings regarding about the defendant's ability to pay legal financial obligations. The fact that a defendant is indigent for purposes of appointment of counsel does not mean they are incapable of contribution to legal financial obligations. In *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015), the Court held that RCW 10.01.160(3) requires the record to reflect an individualized inquiry into the defendant's current and future ability to pay before the court imposes legal financial obligations. RCW 10.01.160(3) states: The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina did not hold that an offender who is indigent under GR 34 must have his legal financial obligations waived. It stated that trial courts should look to the comment of GR 34 for guidance

and that if someone meets the standards for indigency, the court "should seriously question that person's ability to pay LFO's." *Blazina*, 182 Wash. 2d at 838.

Based on the information at sentencing that the defendant owned a substantial amount of property and received monthly income, the court had a sufficient factual basis to order payment of non-mandatory legal financial obligations. The record sufficiently established the defendant's ability to pay.

3. The determination of whether appellate costs should be assessed is premature, where a decision on appeal has not yet been rendered.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wash. 2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wash. App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wash. 2d 620, 8 P.3d 300 (2000).

In *Nolan*, 141 Wash. 2d 620, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Nolan*, 141 Wash. 2d at 622. As suggested by the Supreme Court

in *Blank*, 131 Wash. 2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wash. App. 380, 389–390, 367 P.3d 612, *review denied,* 185 Wash. 2d 1034, 377 P.3d 733 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

> A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its

intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 87 Wash. 2d 814, 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Barklind*, 87 Wash. 2d at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, 131 Wash. 2d 230, the Supreme Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wash. App. 638, 641–642, 910 P.2d 545 (1996), *aff'd,* 131 Wash. 2d 230, 930 P.2d 1213 (1997).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants,

including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *Blazina*, 182 Wash. 2d 827, the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFO's. However, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship". *See* RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, 131 Wash. 2d 230, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Blazina*, 182 Wash. 2d 827. RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

> (2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090. The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

> (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;

> (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
> (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period,* excluding any payments mandatorily deducted by the department of corrections;
> (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations.* The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added).

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel". Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to

excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

In the present case, no decision has been rendered on the appeal. Therefore, objection to costs is premature. However, if the Court does consider the appellant's argument, the Court should find the assessment of costs is appropriate.

D. CONCLUSION

Inclusion of the victims' names in the jury instructions was not a comment on the evidence and did not prejudice the defendant. The victims' names are not an element of the offense.

The trial court made specific findings that the defendant had the ability to pay toward legal financial obligations. Additionally, the Appellant's argument regarding cost on appeal is premature.

The defendant's convictions should be affirmed and legal financial obligations remain in place.

Dated this 13 day of July 2012

Respectfully Submitted by:

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I, Shauna Field, do hereby certify under penalty of perjury that on the 25th day of July, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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July 25, 2017 - 10:59 AM

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Superior Court Case Number:	15-1-00385-1

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